

SERVICE DATE - DECEMBER 19, 1996

SURFACE TRANSPORTATION BOARD¹

DECISION

No. 41622²

ASHLAND CHEMICAL, INC.
v.
J.H. WARE TRUCKING, INC.

No. 41623

UNION CARBIDE CORPORATION
v.
J.H. WARE TRUCKING, INC.

Decided: December 13, 1996

We find that the collection of undercharges sought in these proceedings would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Accordingly, we will not reach the other issues raised in these proceedings.

BACKGROUND

These matters arise out of the efforts of The Plan Committee on behalf of J.H. Ware Trucking, Inc. (Ware or defendant)³ to

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to proceedings that were pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. While this decision generally applies the law in effect prior to the Act, new 49 U.S.C. 13711(g) provides that new section 13711 applies to cases pending as of January 1, 1996, and hence section 13711 will be applied to the factual situation presented in this proceeding. Unless otherwise indicated, citations are to the former sections of the statute.

² This decision embraces two proceedings involving the same defendant and similar facts and issues.

³ On May 20, 1991, Ware filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code. From May 20, 1991, to April 14, 1992, Ware operated as a debtor-in-possession under Chapter 11. On April 14, 1992, a second amended plan of liquidation was confirmed pursuant to which causes of action belonging to Ware were authorized to be brought in the name of
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collect undercharges from Ashland Chemical, Inc. (Ashland), and Union Carbide Corporation (Union Carbide). These proceedings are before the Board on referral from the United States District Court for the Eastern District of Missouri, Eastern Division, in J.H. Ware Trucking, Inc.--Debtor v. Ashland Chemical, Inc., No. 4:93CV157SNL (TIA) and J.H. Ware Trucking, Inc.--Debtor v. Union Carbide Corporation, No. 4:93CV1775SNL (TIA). In the court proceedings, Ware seeks to collect undercharges from Ashland in the amount of \$35,036.91, plus interest, allegedly due for transporting 152 shipments between June 12, 1988, and April 2, 1991. From Union Carbide, Ware seeks to collect undercharges of \$27,533.20, plus interest, for transporting 124 shipments between July 5, 1988, and March 25, 1991. By orders dated September 18, 1995, the court stayed the proceedings and directed complainants to submit issues of contract carriage and rate reasonableness to the ICC for determination.

Pursuant to the court orders, complaints were filed on September 26, 1995, in No. 41622 and No. 41623, by Ashland and Union Carbide, respectively, requesting the ICC to resolve issues of contract carriage, tariff applicability, rate reasonableness, and unreasonable practice. Defendant filed answers on October 31, 1995. By decisions served November 6, 1995, the ICC established procedural schedules for the submission of evidence on non-rate reasonableness issues. Complainants filed their opening statements on December 29, 1995. Defendant did not reply.

Complainants assert that the shipments which are the subject of these proceedings were transported by Ware pursuant to a duly executed contractual agreement between Ware and Industrial Distribution Service (Industrial), a third party broker.⁴ They state that Industrial paid Ware for the transportation services rendered in accordance with the terms of the contract and further contend that the provision of section 2(e) are applicable to these proceedings.

Attached as Appendix B to the opening statement of each of the complainants is an affidavit of Gaetano Monteleone, President of Industrial. Mr. Monteleone states that, in 1987, he and two named representatives of Ware engaged in discussions which resulted in the signing on October 12, 1987, of an agreement under which Ware would provide transportation services for Industrial and its customers. A copy of the agreement, as well as an initial and subsequent rate schedule, are attached as Exhibit B to Mr. Monteleone's affidavit.⁵ Mr. Monteleone asserts

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The Plan Committee, through Wendi S. Alper, Distribution Agent, on behalf of Ware.

⁴ Board records show that Broker License No. MC-172723 was issued to Industrial on April 11, 1984.

⁵ Among the terms set forth in the agreement are the following: (1) Ware is to provide contract carrier services for Industrial, with a portion of its equipment being dedicated to Industrial's exclusive use; (2) Shipments are to be transported in accordance with the rates, charges, and rules set forth in appendix A to the agreement, with mutually agreed-upon rate changes permitted; (3) Published rates filed by Ware are not to

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that it was clearly understood that Industrial was the party with whom Ware was to provide the subject transportation services, and that all invoices were to be directed to Industrial for payment. Mr. Monteleone further states that Ware submitted its invoices to Industrial and that the invoices were paid by Industrial in conformity with the terms of the agreement.

DISCUSSION

We dispose of these proceedings under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."⁶

Here, it is undisputed that Ware is no longer an operating carrier.⁷ Thus, we may proceed to determine whether Ware's attempt to collect undercharges (the difference between the applicable filed rate and the negotiated rate) is an unreasonable practice.

We must first address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed upon by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains a motor transportation contract between Ware and Industrial, which includes a specific provision acknowledging customers of Industrial to be third party beneficiaries, and letters containing schedules of agreed-to

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apply to any shipment tendered to Ware by Industrial; (4) Industrial is to tender to Ware not less than 5 truckload shipments per year; and (5) Industrial is to be responsible for the payment of all rates and charges; Ware is not to invoice Industrial's customers; and Industrial's customers are to be considered third-party beneficiaries under the agreement.

⁶ The ICC Termination Act removed the limitation that made section 2(e) of the NRA applicable only to transportation service provided prior to September 30, 1990. Thus, the remedies in section 2(e) may be invoked for all the shipments in these proceedings, including those shipments that were transported after September 30, 1990.

⁷ Board records disclose that Ware held common carrier and contract carrier authority under Docket No. MC-139973 until the certificates and permits were revoked on July 27, 1992.

rates and charges. Regardless of whether Ware's services to Industrial were held out under its contract carrier authority--which they may well have been--these documents confirm the existence of a negotiated rate agreement between Ware and Industrial and satisfy the written evidence requirements of section 2(e). E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994).

In exercising our jurisdiction under 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

The evidence establishes that Industrial, acting on behalf of its customers Ashland and Union Carbide,⁸ was offered negotiated rates by Ware. Industrial tendered traffic on behalf of its customers Ashland and Union Carbide to Ware in reasonable reliance on the offered rates. Ware billed and collected the negotiated rates. Now, Ware is seeking to collect additional payments from complainants, customers of Industrial, based on higher rates filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Ware to attempt to collect undercharges from Ashland and Union Carbide for the shipments at issue in these proceedings.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. These proceedings are discontinued.
2. This decision is effective on December 19, 1996.
3. A copy of this decision will be mailed to:

The Honorable Stephen N. Limbaugh
United States District Court for the
Eastern District of Missouri,
Eastern Division
U.S. Court & Custom House
1114 Market Street, Room 315
St. Louis, MO 63101

No. 4:93CV157SNL (TIA)
No. 4:93CV1775SNL (TIA)

⁸ Based on the facts of record in these proceedings, Industrial can also be recognized as an independent contractor in its dealings with Ware.

No. 41622 et al.

By the Board, Chairman Morgan, Vice Chairman Simmons, and
Commissioner Owen.

Vernon A. Williams
Secretary